

FILED

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH FRANCIS WARREN,

Defendant - Appellant.

No. 04-35756

D.C. No. CV-04-00054-DWM

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted November 8, 2005 ^{**}

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

Joseph Francis Warren appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence imposed following his guilty plea to conspiracy to distribute methamphetamine. Warren contends that the trial court

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

erred in enhancing his sentence based on judge-found facts, in violation of *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Warren's conviction was final as of the dates the *Booker* and *Blakely* decisions were issued. Warren's claim therefore is foreclosed because, as we recently held, "*Booker* does not apply retroactively to convictions that became final prior to its publication." *United States v. Cruz*, No. 03-35873, 2005 WL 2243113, at *1 (9th Cir. Sept.16, 2005). *See also, Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir.2005) (holding in a 28 U.S.C. § 2254 habeas action that *Blakely* does not apply retroactively to cases on collateral review). Consequently, we affirm the district court.

AFFIRMED.